

Huynh (Migration) [2018] AATA 1379 (10 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms HUYNH Thi Quyen
VISA APPLICANT:	Mr NGUYEN Long
CASE NUMBER:	1609500
DIBP REFERENCE:	OSF2015/070719
MEMBER:	Shane Lucas
DATE:	10 April 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations; and • cls.309.221 and 309.223 of Schedule 2 to the Regulations.

Statement made on 10 April 2018 at 3:52pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – Genuine and continuing relationship – Certificate of marriage – Pooling of finances – Shared housework – Joint responsibility for care of children – Joint social activities – Companionship and emotional support

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2 cls 309.211, 309.221, 309.223

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 24 June 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a Vietnamese national born on 10 October 1989. He applied for the visa on 8 June 2015 on the basis of his relationship with the sponsor ("the review applicant"). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevantly to this matter, the primary criteria include cls.309.211, 309.221 and 309.223.
3. The delegate refused to grant the visa on the basis that the visa applicant did not meet the requirements of cls.309.211(2) and 309.221 of the Regulations, as the delegate was not satisfied that the visa applicant was in a genuine and continuing relationship with the sponsor. The delegate considered that the information and evidence submitted in support of the application was not sufficient to demonstrate that the applicant was the spouse of the sponsor, as defined under s.5F of the Act.
4. The review applicant seeks review of the delegate's decision.
5. The review applicant appeared before the Tribunal on 27 March 2018 to give evidence and present arguments. The visa applicant and an additional witness (being the aunt of the visa applicant and a friend of the review applicant) also gave oral evidence to the Tribunal regarding the genuine and continuing nature of the relationship between the parties.
6. The review applicant was represented in relation to the review by a registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issues in the present case are whether the visa applicant was the sponsor's spouse for the purposes of the Act at the time of application (cl.309.211); whether at the time of decision, the visa applicant continues to satisfy the criterion in cl.309.211 (cl.309.221); and whether at the time of decision, the visa applicant continues to be the spouse of the sponsor (cl.309.223).

Relevant law

9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together or not live separately and apart on a permanent basis [s.5F(2)(a)-(d)]. In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household, and their commitment to each other as set out in r.1.15A(3).

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a spousal relationship. The applicants provided the Tribunal with a certified copy of a Certificate of Marriage showing the marriage was made in Springvale South, Victoria on 28 January 2015; and further documentation attesting to the holding of a wedding celebration in Hue, Vietnam on 28 March 2015. There is nothing to suggest the marriage is not valid. The Tribunal is satisfied on the evidence that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Whether the parties are in a spouse or de facto relationship

11. Clauses 309.211 and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the review applicant. The parties provided documentation attesting that the review applicant (born in Hue, Vietnam on 1 January 1973) became an Australian citizen on 29 April 2003. Accordingly, the review applicant satisfies the requirements of cl.309.211(2)(a).

12. Are the other requirements for a spousal relationship met?

13. The applicants provided documentation to the Tribunal that was not available to the delegate. The Tribunal also had the benefit of hearing oral evidence from the review applicant, the visa applicant and an additional witness, and found the evidence provided to be frank and credible.

14. Financial aspects of the relationship

15. The review applicant provided documentation and gave oral evidence detailing the financial aspects of the relationship. The material provided included documentation attesting to the parties' joint account with the ANZ Banking Group (opened on 6 February 2015) and money transfers from the review applicant to the visa applicant totalling some AUD 9350 between May 2015 and August 2017. The applicant's representative also submitted that the couple had shared some expenses during the visa applicant's time in Australia between November 2014 and February 2015, and during the review applicant's two visits to Vietnam subsequent to their marriage (i.e. March-April 2015 and October 2016). In the applicant's representative's submission, it was stated that:

16. *"the couple has opened a joint account with ANZ Bank in Australia with the aim to provide financial support [to] each other when they are living together. Presently, they live in separate countries. On top of the money the couple has spent*

together when the applicant was in Australia... and the sponsor was in Vietnam... the sponsor has transferred [moneys] to support her husband."

17. On consideration of the evidence, the Tribunal acknowledges that the parties have shared some day-to-day expenses and have taken some steps toward pooling their financial resources. However, the Tribunal found no evidence of any joint ownership of real estate or other major assets or any joint liabilities. The Tribunal also found no evidence that either party owes any legal obligation in respect of the other. Given the constraints of residing in separate countries however, the Tribunal accords little weight to these criteria in this case.

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20. **Nature of the household**

21. The Tribunal received documentation and oral evidence stating that the couple first met in March 2013 when the review applicant travelled to Vietnam to visit family. The review applicant stated that she was asked by an Australian friend (the uncle of the visa applicant) to take gifts to her friend's father (the visa applicant's grandfather) and that the parties met on this occasion. In a written statement to the Tribunal, the review applicant stated that the relationship between the parties developed slowly at this time:

22. *"On this occasion [in March 2013] [the visa applicant] invited me for a meal at his home and we had the opportunity to talk to each other. He asked me about his relatives in Australia. I said to [the visa applicant] if he happened to come to Australia, I would offer to take him around. [The visa applicant] and I talked to each other over the phone for a couple of time before I returned to Australia."*

23. In her written statement, the review applicant stated that she did not have further contact with the visa applicant until he travelled to Australia to visit family members in November 2014. The parties met again at a party held at the home of the visa applicant's uncle (being also a friend of the sponsor) and that the review applicant subsequently took the visa applicant to places of interest in Melbourne, and that the couple had a number of meals together. In her oral evidence to the Tribunal, the review applicant also stated that she introduced the visa applicant to her four children (aged between 24 years and 16 years) from her first marriage at this time. The review applicant also stated that she and the visa applicant commenced an intimate, physical relationship at this time.
24. In her written statement, the review applicant stated that the visa applicant proposed marriage to her on Christmas Day 2014, but that she was initially reluctant to accept due to the sixteen year age difference between the parties. In oral evidence, the review applicant expanded on this issue, stating that she did not accept the visa applicant's proposal until she was certain that her children accepted the relationship. The sponsor stated that her children assured her that they liked the review applicant and that her happiness was all that mattered to them. In response to a direct question from the Tribunal, the review applicant stated firmly that she had not received any moneys from the visa applicant or members of his family in order to assist the visa applicant to obtain a migration outcome.
25. The parties became engaged on 5 January 2015 and were married on 24 January 2015 in Springvale South. The visa applicant returned to Vietnam on 15 February 2015 and the review applicant travelled to Vietnam shortly thereafter (24 March 2015). A wedding ceremony attended by the parties' Vietnamese friends and family members was held in Hue on 28 March 2015. The Tribunal was provided with a wealth of credible photographic evidence and other material documenting these events.

26. Since their marriage, the couple have resided together on three separate occasions: for some five weeks after their engagement in January 2015; for some three weeks around the time of the wedding ceremony held in Hue on 28 March 2015; and for a further ten days during the review applicant's visit to Vietnam in October 2016. The parties provided certified copies and translations of documents issued by the relevant local authorities in Hue regarding the review applicant's temporary stays at the visa applicant's father's home in 2015 and 2016. As regards the visa applicant's stay at the review applicant's home in Australia in January-February 2015, the review applicant stated:

27. *"During the period that [the visa applicant] and I lived together at my home, we have shared all domestic chores and care for my children who supported my marriage to [the visa applicant]."*

28. On consideration of the evidence, the Tribunal found some evidence attesting to the living arrangements of the persons during their limited time together. The Tribunal also found some evidence of the sharing of responsibility for housework, and of joint responsibility for the care and support of children. Given the constraints of residing in separate countries however, the Tribunal accords little weight to these criteria in this case.

29. **Social aspects of the relationship**

30. The Tribunal received detailed and credible Statutory Declarations regarding the development, and genuine and continuing nature of the relationship between the parties, from members of their respective families and friendship networks, including from the review applicant's two eldest children. In the declaration provided by the review applicant's oldest child, it is hinted that the review applicant's first marriage was an unhappy and abusive one. The review applicant's son states:

31. *"My mum has been divorced for a while now and it was about time she found happiness. She is very happy with my step-dad... I've never seen her happier. He [the visa applicant] doesn't abuse her and treats her well. I genuinely like him."*

32. In oral evidence to the Tribunal, the review applicant confirmed that her first marriage was an unhappy and abusive relationship, characterised by incidents of domestic violence. The review applicant became visibly distressed during her evidence regarding her first marriage, stating that she separated from her first husband in 2003 and was divorced in 2012. She stated that her first husband has no ongoing contact with her four children from the marriage.
33. The Tribunal also received a Statutory Declaration and oral evidence from the witness, being the aunt of the visa applicant and a friend of the review applicant. The witness stated that members of the parties' families had been initially concerned about the couple's relationship due to their sixteen year age difference. The witness stated that she initially thought the relationship was "very unusual", but that she has been convinced by the evident sincerity of the couple's commitment to each other. In her Statutory Declaration, the witness stated that she fully supports the marriage and has no doubts that the couple will have a better future together.
34. The Tribunal also received a wealth of photographic evidence showing the couple – together and/or in the company of others – engaging in social activities with members of their respective families and friendship networks in Australia and Vietnam. The photographs depict the couple at a range of formal occasions, including their engagement celebration in Australia in January 2015; their wedding in Australia later that same month; and their wedding celebration in Vietnam in March 2015. The photographic evidence also portrays the couple together and/or in the company of others in informal social settings during the review applicant's visits to Vietnam in March-April 2015 and October 2016. These photographs

appear spontaneous and casual, and show the couple engaging in a range of social and recreational activities.

35. On consideration of the evidence, the Tribunal gives substantial weight to the frank and credible evidence provided by the review applicant and the witness attesting to the genuine and continuing nature of the relationship. The Tribunal also accords significant weight to the Statutory Declaration provided by the review applicant's oldest son regarding his mother's troubled relationship history and the happiness she has found in her relationship with the visa applicant. The Tribunal is therefore satisfied that the persons represent themselves to other people as being married to each other, and that the couple's family members and friends regard the relationship as a genuine and continuing one. The Tribunal is also satisfied that the couple plan and undertake joint social activities within the constraints of principally residing in separate countries.

36. Nature of the persons' commitment to each other

37. The Tribunal received documentation and oral evidence regarding the nature of the parties' commitment to each other. As stated above, the couple claim to have met in March 2013 in Vietnam. Their relationship did not develop further however until the visa applicant travelled to Australia in November 2014 to visit his relatives, being also friends of the review applicant. The delegate expressed concerns regarding the "quick inception" of the relationship in the timeframe between the couple meeting again in Australia in late 2014, and becoming engaged – and then married – in early 2015. The Tribunal however found the review applicant's account of the rapid evolution of the relationship to be credible, and that the frank and credible evidence provided by the witness and via the Statutory Declarations provided by the review applicant's eldest children, supported the review applicant's account of the relationship's development.
38. The Tribunal was also provided with documentation attesting to the parties' ongoing communication via telephone and through social media, and the review applicant demonstrated a strong and contemporary understanding of the visa applicant's situation and circumstances in Vietnam. The review applicant stated that the couple speak regularly and that they talk about their daily lives and any difficulties they are experiencing. In response to questions from the Tribunal, the review applicant stated that she has not returned to Vietnam for some eighteen months principally due to financial and work-related constraints.
39. The parties have now been married for over three years and have lived together as spouses (and are not living separately and apart on a permanent basis) on three occasions in that time, notwithstanding the constraints of principally residing in separate countries. In oral and written evidence, the couple spoke knowledgeably and credibly about the inception of their relationship; the development of the relationship; the emotional support they provide to each other while apart through their regular communication, principally through Viber; and their aspirations for a future together. In response to questions from the Tribunal, the review applicant stated that she did not wish to have more children and that the couple have spoken about this. The visa applicant has indicated that he is content to be a father-figure to the review applicant's children from her previous marriage, particularly the youngest boy who is sixteen years of age.
40. Upon considering the evidence, the Tribunal accepts that the relationship between the couple has evolved over several years; that the couple has been married for over three years; and that the couple has lived together on three occasions over the course of that time, notwithstanding the constraints of principally residing in separate countries. The Tribunal is also satisfied that the couple draw on each other to a significant degree for companionship and emotional support, and that they view their relationship as being long term.

41. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the visa applicant and the review applicant had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied that the visa applicant and sponsor have lived together (and are not living separately and apart on a permanent basis) and have a shared commitment to a future as a married couple.
42. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the visa applicant meets cls.309.211(2)(a), 309.221 and 309.223.
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45. **Conclusion**
46. Given the findings above, the appropriate course is to remit the application for a visa to the Minister to consider the remaining criteria for grant of a Subclass 309 visa.

DECISION

47. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cls.309.221 and 309.223 of Schedule 2 to the Regulations.

Shane Lucas
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).